APR 28 1981

No. 80-1333

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANK J. PROCHASKA,

Petitioner,

vs.

FRANCIS H. MARCOUX,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

The Respondent herein (Marcoux) was and is a wildlife conservation officer employed by the State of Colorado. On June 28, 1976, the Petitioner (Prochaska) was fishing from his personal motor boat on Lake Estes, near Estes Park, Colorado. Pursuant to Colorado Boat Registration Statutes and Regulations, Prochaska was required to display a colored 1976 boat registration sticker on the outside of his boat. Prochaska displayed no such sticker and this fact was viewed from the shore by Marcoux. By deposition, Prochaska has admitted that he did not display the sticker required by Colorado law. Marcoux verified the absence of the sticker with binoculars that he carried with him and after obtaining a boat from the marina owner at the lake, Marcoux approached Prochaska for a license and safety equipment inspection. Under Colorado law, in addition to the required inspection sticker, all boats such as that operated by Prochaska were required to carry certain safety equipment. Under these same statutes (see Appendix A) a wildlife conservation officer "shall have the authority to stop and board any vessels" to enforce the above safety regulations. By Colorado Statute, a wildlife conservation officer also has the authority to assure that all fishermen are properly licensed and require "the immediate production of such license".

Contrary to the Petitioner's Statement of Facts, Marcoux's contact with Prochaska on Lake Estes was not random. Rather, the contact was generated entirely by the undisputed absence of the statutorily required boat license or sticker. At the time Marcoux approached Prochaska's craft, it had an outboard motor with a windshield and no roof or cabin was attached. Prochaska produced a fishing license upon request and when asked to display certain items of required safety equipment, he indicated that he did not have a fire extinguisher or sounding device. The oar required by Colorado Safety Regulations had been replaced with a snow shovel. According to Prochaska, he informed Marcoux at this time that the safety equipment had been lost when the boat had been swamped some time prior to this incident. As indicated in the decision of the Tenth Circuit, Marcoux remained in his own boat during

this entire period of time and did not enter Prochaska's boat or search it. The examination of Prochaska's boat was entirely visual.

Prochaska was requested to follow Marcoux to the shore and at the shore, Prochaska was questioned about his boat registration. At that point, Prochaska informed Marcoux that he had his temporary registration permit at his home. At that time, a summons and complaint was issued for a misdemeanor violation of safety equipment regulations and Prochaska was ordered to appear for arraignment on July 2, 1976 in the Estes Park County Court. Prochaska was also requested to bring his temporary registration with him to that arraignment.

Prior to July, 1976, Marcoux telephoned the Records division of the Parks and Recreation Division in Denver and requested information on the registration number obtained from Prochaska's boat. Marcoux was informed that the Division had no record of any such number and a cross-check of Prochaska's name against the Division registration records indicated that Prochaska had no boat registered to him. As a consequence, on July 2, 1976, Marcoux prepared a second Summons and Complaint relative to a violation of the Colorado Motorboat Registration Law, and on that date, filed the Summons and Complaint with the Clerk of the Estes Park County Court. When Prochaska appeared for arraigment, Marcoux personally handed a copy of the Summons and Complaint to Prochaska in the County Court. Prochaska immediately produced a copy of his temporary registration and within two to three minutes, Marcoux informed the prosecuting attorney of the fact that the second Summons and Complaint appeared to have no basis. The prosecuting attorney then moved for the dismissal of the second Summons and Complaint and it was dismissed.

At the time of his arraignment on July 2, 1976, Prochaska was not represented by an attorney and subsequently, entered a plea of not guilty to the original Summons and Complaint. The charges involving the safety device violations were subsequently tried in the Larimer County Court and Prochaska was convicted and found guilty. Prochaska appealed the conviction to the

District Court in Larimer County and the conviction was upheld. Prochaska had obtained an attorney relative to the defense of the original Summons and Complaint, but never retained an attorney with respect to the criminal charges temporarily brought by way of the second Summons and Complaint.

The above rendition of facts was drawn entirely from the depositions taken of Prochaska and Marcoux. Following the depositions of both parties to this matter, Marcoux filed a Motion for Summary Judgment. Approximately seven weeks later, a hearing was held before the trial court judge on the Motion for Summary Judgment. At the time of the hearing, Prochaska had filed neither a Brief in Opposition to the Motion nor affidavits of any nature. As indicated in the trial court ruling on this issue, the District Judge found no Fourth Amendment violation under the facts of this case. The trial court specifically emphasized that the ruling was not based on any theory of a trivial or inconsequential constitutional violation. The trial court simply found that there was no constitutional violation under these facts. The trial court also denied Marcoux's Motion for Attorney Fees specifically finding that the Complaint was not frivolous, unreasonable or without foundation.

An appeal was taken by Prochaska to the Tenth Circuit on the trial court's ruling and a cross-appeal was asserted by Marcoux on the issue of attorneys fees and the trial court's finding that the original Complaint was not frivolous. Contrary to the Petitioner's assertion that Marcoux "did not say one word about the denial of attorneys fees" and "never took the time to brief the question of an award of attorneys fees", this issue was entensively briefed by Marcoux and presented to the Tenth Circuit.

Oral argument was scheduled by the Tenth Circuit for its July 1980 term with a specific directive that:

> "Counsel, upon receipt of this calendar, should reconsider whether or not in light of briefs filed by the parties, oral argument of the matter would be significantly helpful to a determination of the appeal. If the

> conclusion is that oral argument would not be helpful, COUNSEL ARE THEN DIRECTED TO FILE MOTIONS TO SUBMIT ON THE BRIEFS AND BE EXCUSED FROM ATTENDANCE. THESE MOTIONS MUST BE RECEIVED BY THE CLERK NOT LATER THAN FRIDAY, JUNE 20, 1980. A ruling by the court must be obtained to excuse attendance at argument".

The Tenth Circuit scheduled the matter for oral argument on July 7, 1980. On July 6, 1980, the undersigned counsel was advised by the office of counsel for Petitioner that Petitioner was detained in Chicago, Illinois due to the death of his mother and would not be able to attend the oral argument. The undersigned counsel contacted the Clerk of the Tenth Circuit Court of Appeals and was advised that argument would be held as scheduled. Respondent's counsel was also advised that the matter could be submitted on the briefs or argument made by Respondent. The undersigned counsel appeared before the Tenth Circuit on July 7th and answered questions from the Court and essentially responded to Prochaska's Reply Brief. As is indicated by the contents of Appendix C, the Clerk of the Tenth Circuit had simply been informed that Prochaska's attorney had left the State for Chicago and would not be present for oral argument. According to the Clerk, no motion was filed by Prochaska's attorney in connection with that development.

ARGUMENT

A. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN THIS MATTER IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR ANY OTHER FEDERAL COURT OF APPEALS.

The circumstances surrounding the Petitioner's detention and subsequent conviction in this matter simply involve no violation of his constitutional rights. The ruling of the trial court granting summary judgement specifically recognizes this fact and is not premised on a theory of de minimis or inconsequential contitutional violation. Petitioner's attempt to misdirect the issues in this case and classify the lower rulings as such is simply incorrect. As is noted in the Circuit Court opinion which is the subject of this Petition, every action taken by Marcoux in this case was pursuant to a Colorado Statute or based upon undisputed probable cause. Mr. Prochaska did not display the required boat registration or have the requisite safety equipment in his boat. Marcoux's actions in this case and the subsequent conviction of Prochaska do no violence whatsoever to this Court's ruling in *Delaware v. Prouse, 440 U.S. 648* (1979). While the stopping of Prochaska by Marcoux was clearly not random, but rather, was based on admitted probable cause or clear articulable suspicion of a boat registration violation, even a random stop by a game warden would not appear to fall under the Court's ruling in *Prouse.* As Justice Blackmun noted in his concurring opinion in *Prouse,* he did not regard that case "as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties".

The facts presented by this Petition involve a public official performing his duties in an entirely reasonable manner, specifically mandated by Colorado Statutes. Even allegations of constitutional violations and damage claims clothe this case with a factual dignity it does not deserve. The finding of the Tenth Circuit that the Plaintiff's claims in this matter are frivolous is well supported by the

undisputed facts. Under these circumstances, the granting of a Motion for Summary Judgment and appellate approval of such an order cannot be and is not in conflict with any other Federal Court of Appeal's decision or any decision of this Court.

B. THE STANDARD FOR AWARDING ATTORNEYS FEES TO PREVAILING DEFENDANTS IN CIVIL RIGHTS CASES IS ESTABLISHED BY DECISIONS OF THIS COURT, AND THE RULING OF THE TENTH CIRCUIT IN THIS CASE COMPORTS WITH THAT STANDARD. BAD FAITH BY A PLAINTIFF IS NOT AN ELEMENT OF THIS STANDARD.

Petitioner's Brief makes three separate references to the fact that the issue of attorneys fees in this matter was not briefed before the Tenth Circuit, leaving the inference that the Circuit Court did not have the benefit of applicable law on the subject. As the record in this matter indicates, the question of attorneys fees was extensively briefed by Respondent in his Cross-appeal on that subject. It was Petitioner who failed to brief the issue and who apparently failed to consider the question a meaningful part of the Circuit Court appeal. Under any circumstance, as is true with respect to the civil rights issue involved herein, the Circuit Court opinion concerning attorneys fees is absolutely consistent with the rulings of this Court and other Federal Circuit Court of Appeals. Simply put, a frivolous civil rights complaint such as that presented by Prochaska meets the threshold legal requirement for the granting of attorneys fees to the prevailing Defendant.

Essentially, the Petitioner contends that the standard under which prevailing civil rights defendants may recover attorneys fees as costs, needs to be clarified by this Court, and argues that the standard should be limited to bad faith by the complaining party. Recent decisions of this Court dispose of the question. As enunciated in *Christianburg Garment Co v. EEOC*, 434 U.S. 412, 422 (1978), the applicable test is simply whether the civil rights claim is "frivolous, unreasonable, or

groundless". This court has recently had an opportunity to restate that principle in *Roadway Express, Inc. v. Piper*, _____ U.S. _____, _____, 100 S. Ct. 2455, 2462 (1980). Specifically, this Court made the following statement on this question:

> "The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to anti-discrimination policy. Unlike §1927, both §1938 and §2000e-5(k) restrict recovery to prevailing parties. In addition, those provisions have been construed to treat plaintiffs and defendants somewhat differently. Prevailing plaintiffs in civil rights cases win fee awards unless 'special circumstances would render such an award unjust,' but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is 'frivolous, unreasonable, or groundless.' This distinction advances the congressional purpose to encourage suits by victims of discrimintion *while deterring frivolous litigation.*"

The question of the applicable standard for awarding attorneys fees to prevailing civil rights defendants has been settled by this Court. The Circuit Court ruling in this regard follows that exact standard.

C. DUE PROCESS DOES NOT REQUIRE AN ABSOLUTE RIGHT TO ORAL ARGUMENT IN ALL CASES. UNDER THE FACTS OF THIS CASE, DUE PROCESS HAS NOT BEEN DENIED PETITIONER.

Because of the unique circumstances and facts behind Petitioner's contentions surrounding oral argument before the Circuit Court of Appeals, the presentation of this issue to this Court is necessarily awkward. The only record on this question is made up of the memory of counsel and that of the Clerk of the Tenth Circuit as reflected in Appendix C. In this respect, as indicated in the Statement of Facts, the undersigned counsel was not aware that

Petitioner's counsel contends he sought a continuance of the oral argument until the issue was presented to the Tenth Circuit by way of Petition for Rehearing approximately three months after oral argument was initially scheduled. Under any circumstance, the format of the oral argument that was held dealt primarily with this counsel's response to supplemental briefs filed by Prochaska in reply to Marcoux's single Circuit Court appeal brief. Additionally, specific questions were directed to this counsel from the Circuit Court primarily dealing with the facts elicited by depositions and Colorado Statutes authorizing the actions taken by Marcoux in this case.

Taking the limited factual situation available to this Court as a background, it is Respondent's position that no due process violation has taken place. While there is a paucity of authority on this subject, the question is not without some guidance by this Court. In *Federal Communications Commission v. WJR,* 337 U.S. 265 (1949), the court discussed the identical subject. On page 275 of the decision, the following pronouncements were made:

> "Certainly the constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed, even substantial ones are raised".

In this case, the Circuit Court had ruled that oral argument was mandated at the original hearing on the merits of the issue involved. This, of course, is in contrast to the appellate context presented in the instant case. However, in discussing the due process question presented, and in overruling the Circuit Court's decision that oral argument was of constitutional dimension in that case, this Court also made the following pertinent statements on page 274, 275 and 277:

> "Taken at its literal and explicit import, the court's broad constitutional ruling cannot be sustained. So taken, it would require oral argument upon every question of law . . . It is enough to say that due process of law, as conceived by the Fifth Amendment has never been cast in so rigid and all-inclusive

> confinement . . . This court has held in some situations that such argument is essential to a fair hearing, *Londoner v. Denver*, 210 U.S. 373, in others that arguments submitted in writing is sufficient. *Morgan v. U.S.*, 298 U.S. 468. . . We should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument.

The decision in *Londoner* involved a fact situation in which the appellant received no hearing at all on a tax assessment. In that case, the aggrieved party had not been allowed to present proof of his position or argue the matter. The circumstances in *Londoner* are quite different from those presented in this case. In the instant matter, the Circuit Court could have relied solely on the briefs and dispensed with oral argument entirely. This appears to be the rule in all circuits in the United States, and indeed such a procedure appears to be sanctioned by Rule 38.1 of this Court. Under any circumstance, the due process question surrounding a right to oral argument would appear to have more significance at the trial court level, especially in a jury trial. The distinction between oral argument in the jury context vis-a-vis a trial to the court is discussed in an annotation dealing with limitations on the right of a trial court to limit oral argument. See Annot., 3 ALR3d 1341 (1965). On page 1346 of this annotation, in footnote 17, the author discusses those cases which have upheld the right of a trial court to deny oral argument completely. In this respect, the author makes specific reference to the fact that those cases which have denied oral argument completely have generally been trials to the court sitting without a jury. In essence, appellate courts dealing with this question have placed more emphasis on the right to argue if a jury is involved.

In the instant matter, the proceedings were initially argued to the trial court. The issue of attorneys fees was submitted to the Court on motion and the Court ruled without argument. Petitioner now contends that he has a constitutional due process right to argue at the Circuit

Court level. While this may be a case of first impression under the unique facts or lack of facts presented, the policy considerations involved do not place this case at that end of the spectrum at which a right to oral argument may well be of constitutional procedural due process significance. Put another way, if oral argument may be waived or dispensed with completely within the discretion of the court involved, Respondent respectfully suggests that this matter is hardly a proper case in which the parameters of oral argument and due process can be decided.

CONCLUSION

The facts of this case are relatively simple and the material facts undisputed. A wildlife law enforcement officer of the State of Colorado lawfully apprehended and convicted the Petitioner for a rather insignificant misdemeanor violation. The conviction was appealed within the State Court system and was upheld. Further review at two levels of the Federal judicial system resulted in the same conclusion. A Federal Circuit Court of Appeals has factually found that the pursuit of this matter in the Federal system was frivolous. The Circuit Court's opinion clearly does not conflict with decisions of other circuits or of this Court. The particular circumstances under which the Petitioner did not participate in oral argument do not constitute a violation of due process.

The Respondent respectfully requests that this Petition for Certiorari be denied.

Respectfully submitted,

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of HALL & EVANS
2900 Energy Center One
717 Seventeenth Street
Denver, Colorado 80202
Telephone: 573-5022

Attorneys for Respondent

Insofar as the above brief may include factual assertions by counsel which are independent of the record in this matter, counsel for the Respondent, by his above signature, being first duly sworn, deposes and states that said facts are true to the best of this counsel's knowledge and belief.

Subscribed and Sworn to before me this _____ day of _____, 1981.

My Commission expires _____.

_____

Notary Public

APPENDIX A

Applicable portions of Colorado Statutes and Regulations.

1.*C.R.S. 1973, 18-1-901*

"Peace officer means . . . a wildlife conservation officer".

C.R.S. 1973, 16-3-102

"A peace officer may arrest a person when . . . any crime has been or is being committed by such person in his presence; or he has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested".

C.R.S. 1973, 16-3-103

"A peace officer may stop any person who he reasonably suspects is committing, has committed, or is about to commit a crime and may require him to give his name, address and an explanation of his actions. The stopping shall not constitute an arrest".

C.R.S. 1973, 16-3-105

"When a person has been arrested without a warrant, he may be released by the arresting authority on its own authority if . . . the offense for which the person was arrested and is being held is a misdemeanor or petty offense, and the arresting authority or a responsible command officer of the arresting authority is satisfied that the person arrested will obey a summons commanding his appearance at a later date. If the person is released in accordance with (the above procedure) he shall be given a summons and complaint . . . and shall sign a written acknowledgement of its receipt and a promise to appear at the time and place specified."

2. *C.R.S. 1973, 33-4-101*

"*Licenses required* - Any person 15 years of age or over who angles or fishes for fish or bullfrogs in this State shall have on his person a proper and valid fishing license."

C.R.S. 1973, 33-6-110

"*Inspection and possession of licenses* - Every officer charged with enforcing the provisions of this title has the authority to demand of any person who he has reason to believe has exercised the benefits conferred by any license . . . the immediate production of such license . . . and such officer shall have the right and opportunity to inspect the same. Wilful refusal to produce such license upon demand is a misdemeanor and upon conviction thereof shall be punished as provided above."

3. *C.R.S. 1973, 33-31-105*

"Every motorboat shall be provided with an efficient whistle or other sound producing mechanical device . . . All motorboats shall carry the number, size and type of fire extinguishers as required by this subsection."

C.R.S. 1973, 33-31-103

"*Numbering of motorboats and sailboats.* Every number certificate issued pursuant to this Article shall continue in full force and effect for a period ending December 31st of the year of issuance of the certificate."

C.R.S. 1973, 33-31-104

". . . The number certificate shall be of pocket size and shall be available at all times for inspection whenever the vessel for which it is used is in operation."

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Assignment of Cases for Hearing at the

JULY, 1980, TERM

at

DENVER, COLORADO

The Court will convene at the United States Courthouse, Room C404, 1929 Stout Street, Denver, Colorado 80294, at 9:30 a.m. on Monday, July 7, 1980, and will sit in two Divisions on Monday, July 7, 1980; Tuesday, July 8, 1980; Wednesday, July 9, 1980; Thursday, July 10, 1980; and Friday, July 11, 1980.

Counsel arguing cases should report to the Clerk's Office, United States Court of Appeals, at least fifteen (15) minutes before Court. Counsel arguing at 2:00 p.m. should report not later than 1:45 p.m.

> *Parks Board Regulation No. 201*
>
> *Expiration date decal* - "In addition to the I.D. number, there shall be issued an expiration date decal *which shall be attached to each side of the bow of the forward half of the vessel,* two inches to the left of the letter 'C' of the identification number."
>
> *C.R.S. 1973, 33-31-111*
>
> "*Enforcement.* Every wildlife conservation officer, parks and recreation officer and peace officer of this State and its political subdivisions and all persons deputized by the Division as boat wardens *shall have the authority to enforce the provisions of this Article and in the exercise thereof, shall have the authority to stop and board any vessels subject to the provisions of this Article.*"

Counsel arguing cases should fill in, sign and return to the Clerk the enclosed calendar appearance forms within ten (10) days from the receipt of this Calendar.

Your attention is directed to the Revised Rules of this Court, effective November 13, 1972, as amended September 12, 1979, and to the Federal Rules of Appellate Procedure. Not more than twenty (20) minutes to a side will be allowed for oral argument in "B" Calendar cases and not more than thirty (30) minutes to a side will be allowed for oral argument in "A" Calendar cases. "A" and "B" Calendar cases are designated by (A) and (B).

Where cases are bracketed on the Calendar, they are consolidated or companion cases to be argued and submitted as a single case and the time allowed for oral argument will be governed by the preceding paragraph. Where division of time among attorneys representing each side is needed, the attorneys should make that division prior to appearance for argument.

Counsel, upon receipt of this Calendar, should reconsider whether or not, in light of briefs filed by the parties, oral argument of the matter would be significantly helpful to a determination of the appeal. If the conclusion is that oral argument would not be helpful, COUNSEL ARE THEN DIRECTED TO FILE MOTIONS TO SUBMIT ON THE BRIEFS AND BE EXCUSED FROM ATTENDANCE. *THESE MOTIONS MUST BE RECEIVED BY THE CLERK NOT LATER THAN FRIDAY, JUNE 20, 1980.* A ruling by the Court must be obtained to excuse attendance at argument.

Counsel, upon receipt of this Calendar, should also review the authorities cited in their briefs. If cases have been decided since the briefs were filed which should be called to the Court's attention, a supplemental typewritten memorandum should be filed in an original and nine (9) copies together with proof of service on the parties to show the effect of such decisions upon the arguments made in the briefs. The Court wishes to review such memoranda prior to the date of argument.

APPENDIX C

July 7, 1980

Honorable James E. Barrett
Circuit Judge
Cheyenne, Wyoming

Honorable William E. Doyle
Circuit Judge
Denver, Colorado

Honorable James K. Logan
Circuit Judge
Olathe, Kansas

Re: Nos. 79-1347 and 79-1348, Prochaska v. Marcoux

Dear Judges:

The Clerk received a telephone call from the office of Joe Jenkins, Estes Park, Colorado, which informed the Clerk that Mr. Jenkins' mother died and that he flew to Chicago and will not be present for the argument of the captioned cases.

No written motion will be timely filed in connection with this appeal.

Respectfully,

HOWARD K. PHILLIPS

Clerk

HKP/dvc